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No. 06-1057

In the Supreme Court of the United States

CORUS STAAL BV, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the final results of the Department of Commerce's administrative review of antidumping duties, which petitioner concedes are consistent with the statute and the Department's policies at the time the results were issued, must be set aside because, while the case was pending on appeal, the Department announced that it would prospectively apply a different methodology for calculating dumping margins in initial antidumping investigations (which are not at issue here), but the Department has made clear that the new policy does not apply retroactively in administrative reviews of past entries.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a) is not published in the Federal Reporter but is reprinted in 186 Fed. Appx. 997. The opinion of the Court of International Trade (Pet. App. 3a-27a) is reported at 387 F. Supp.2d 1291.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 2006. A petition for rehearing was denied on September 12, 2006 (Pet. App. 1a). On November 30, 2006, Chief Justice Roberts extended the time within which to file a petition for a writ of certiorari to and including January 25, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. Antidumping laws provide for the imposition of antidumping duties where "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673. If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an antidumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i).

If the Department of Commerce makes a final determination that merchandise is being sold in the United States at less than its fair value, the Department is required to determine an "estimated weighted average dumping margin." 19 U.S.C. 1673d(c)(1)(B). The statute specifies that the "dumping margin" is "the amount by which the normal value exceeds the export price," and that the "weighted average dumping margin" is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices" for that exporter or producer. 19 U.S.C. 1677(35)(A) and (B).

Under the Department of Commerce's long-standing construction of the statute, it only counted positive dumping margins when calculating aggregate dumping margins. If normal value did not "exceed[]" the export price, 19 U.S.C. 1677(35)(A), the Department concluded that there was no, or zero, "dumping margin," and thus nothing to include when summing the "aggregate dumping margin" that the statute specifies as the numerator

in the "weighted average dumping margin" ratio. 19 U.S.C. 1677(35)(B).

Under the statutory scheme, once an affirmative dumping determination has been made, exporters and producers must then post a cash deposit or security for each entry in an amount based on their dumping margin. 19 U.S.C. 1673d(c)(1)(B). Before final liquidation of entries subject to an antidumping order, the statute provides that on an annual basis any interested party may request an administrative review of the antidumping duty. 19 U.S.C. 1675. The dumping margin that is determined during the course of that review then becomes the rate at which the entries subject to the review are liquidated as well as the basis for estimated antidumping duties on new entries. 19 U.S.C. 1675(a)(2)(A) and (C). Without a request for an administrative review, the Department of Commerce liquidates the merchandise at the cash deposit rates (*i.e.*, the deposit rates at the time of entry). See 19 C.F.R. 351.212(c)(i) (2003).

2. In 1994, the United States became a signatory to several Executive agreements, known collectively as the Uruguay Round Agreements (the Agreements), one of which is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement), *reprinted in* 1 H.R. Doc. No. 316, 103d Cong., 2d Sess. 1453. Congress enacted the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809 (19 U.S.C. 3501 *et seq.)*, to implement those Agreements. 19 U.S.C. 3511. In the URAA, Congress established detailed rules regarding the relationship between the Agreements and domestic law (including domestic trade laws), as well as an elaborate process for dealing with disputes concerning the consistency of domestic laws with the Agreements.

As a general matter, Congress emphasized the continuing primacy of domestic law in the event of any conflict between it and the Agreements. As such, "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. 3512(a)(1). Congress further stated, with respect to the interaction of the URAA and domestic law, that "[n]othing in this Act shall be construed * * * to limit any authority conferred under any law of the United States * * * unless specifically provided for in this Act." 19 U.S.C. 3512(a)(2).

The URAA also clarifies that neither the Agreements nor the fact of Congress's approval of the Agreements creates privately enforceable rights or provides a basis for challenging Executive Branch action:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

Because the URAA specifies that the Agreements create no privately enforceable rights and cannot provide the basis for challenging administrative actions, disputes with respect to the United States' compliance with its obligations under the Agreements can be

brought only through the mechanisms provided in the Agreements themselves. See Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding), 33 I.L.M. 1226 (1994); 19 U.S.C. 3511(d)(16). Those procedures include bringing disputes before a World Trade Organization (WTO) panel, the findings of which can be appealed to the WTO Appellate Body. See Dispute Settlement Understanding, Arts. 6, 17, 33 I.L.M. at 1230, 1236. Private entities may not initiate a proceeding before a WTO panel; rather, only a WTO Member may invoke the WTO dispute settlement procedures. *Id.* Art. 2.1, 33 I.L.M. at 1226.

Congress was very specific, when it enacted the URAA, about the manner in which the United States would respond to reports issued by WTO panels or the WTO Appellate Body. The Statement of Administrative Action (SAA) approved by Congress in connection with the passage of the URAA, see 19 U.S.C. 3511(a), 3512(d), makes clear that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change." H.R. Doc. No. 316, *supra*, at 659. Nor may a party ask a court to direct implementation of a WTO Report. To the contrary, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Ibid.*

In the URAA, Congress established two procedures by which a WTO report may be implemented in domestic law. The first method, set forth in Section 123 of the URAA, 19 U.S.C. 3533, establishes a procedure for amending, rescinding, or modifying an agency regulation or practice that a WTO report indicates is inconsistent with the Agreements, including the Antidumping

Agreement. Section 123(g) specifies that the regulation or practice that the WTO body has found inconsistent with the Agreements "*may not* be amended, rescinded, or otherwise modified * * * unless and until" the elaborate procedures detailed in the subsection have been complied with. 19 U.S.C. 3533(g)(1) (emphasis added). The United States Trade Representative (USTR) is required to consult with the appropriate congressional committees, agency or department head, and private sector advisory committees, and to provide an opportunity for public comment, before determining whether and how to implement a WTO report. 19 U.S.C. 3533(g)(1)(A)-(E).

A second procedure for implementing a WTO report in domestic law is set forth in Section 129 of the URAA, 19 U.S.C. 3538. Section 129 is narrower in scope than Section 123(g), and applies, *inter alia*, to the situation in which a WTO report indicates that a particular action by the Department of Commerce in an antidumping proceeding was not in conformity with the United States' obligations under the Antidumping Agreement. 19 U.S.C. 3538(b)(1). Like the statutory procedure under Section 123, Section 129 provides for consultation between USTR and relevant stakeholders before the USTR makes a determination whether and how to implement the WTO body report. 19 U.S.C. 3538(b)(3) and (d). Upon completion of this process, the USTR "*may* * * * direct the [Department] to implement, in whole or in part," a new determination consistent with the WTO body's findings. 19 U.S.C. 3538(b)(4) (emphasis added). If the USTR requests that the Department issue a new determination and orders the Department to implement it under Section 129, that new determination applies only to "unliquidated entries of the subject mer-

chandise" that are entered or withdrawn from warehouse for consumption on or after the date the USTR directs the Department to implement the new decision. 19 U.S.C. 3538(c)(1).

In the URAA, Congress made clear that the USTR could, after consultation, choose *not* to alter the administrative action that is the subject of an adverse WTO report, and may instead offer the complaining party trade compensation in some other form. 19 U.S.C. 3538(b)(4) (the USTR "may" direct implementation of new determination consistent with WTO report "in whole or in part"); H.R. Doc. No. 316, *supra*, at 1015; 19 U.S.C. 3533(f)(3) (requiring the USTR to consult with the appropriate congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation") (emphasis added). Importantly, the political branches could decide not to implement the new determination, but instead to compensate the complaining party in some other way. See Dispute Settlement Understanding, Arts. 3.7, 22, 33 I.L.M. at 1227, 1239; H.R. Doc. No. 316, *supra*, at 1016.

3. Petitioner is a Dutch corporation, Corus Staal BV, that manufactures and exports steel products to the United States. In 2001, the Department of Commerce determined that hot-rolled steel from the Netherlands was being sold, or likely to be sold, in the United States at less than fair value and issued an antidumping duty order on November 29, 2001. *Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565. On December 26, 2002, the Department initiated its first administrative review of that order, covering the period May 3, 2001, through October 31, 2002, and it issued the final results

of that administrative review on June 16, 2004. *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 33,630, as amended by, *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Amended Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 43,801 (2004). In the final results, the Department explained that it continued to treat petitioner's nondumped sales in the same manner that it had always treated nondumped sales—in other words, the Department did not offset dumped sales with non-dumped sales in the margin calculation. See *Issues and Decision Memorandum for the 2001-2002 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review* 14 (June 16, 2004) <http://ia.ita.doc.gov/frn/summary/netherlands/04-13495-1.pdf>.

4. Petitioner challenged the Department of Commerce's methodology for calculating the dumping margin in the Court of International Trade, which upheld the final results of the Department's administrative review in an order dated July 19, 2005. Applying settled Federal Circuit precedent, the court held that the Department's methodology was a reasonable interpretation of the statutory provision governing the calculation of dumping margins. Pet. App. 12a-13a. The court rejected petitioner's contention that the Department's interpretation was unreasonable because it allegedly conflicted with a report issued by the WTO Appellate Body. *Id.* at 13a-15a. The court concluded that, until the political branches had fully determined whether and how to implement an adverse WTO report, the court must sustain the Department's methodology. *Ibid.* Moreover,

the court noted that, even if Commerce were to implement an adverse report and change its methodology with respect to the antidumping order underlying the administrative review, any determination to implement a change pursuant to 19 U.S.C. 3538 would only affect entries that were entered or withdrawn on or after the date upon which the USTR directs implementation. Pet. App. 16a-17a & nn.15, 16.

5. Petitioner appealed, and the United States Court of Appeals for the Federal Circuit affirmed in a judgment without opinion dated June 13, 2006. Pet. App. 2a. Petitioner sought rehearing on the ground that the United States had announced, shortly before the panel's order, that it would accept an adverse WTO report holding that the Department's practice of zeroing negative dumping margins in average-to-average price comparisons in antidumping investigations was inconsistent with the Antidumping Agreement. *Id.* at 65a. While petitioner recognized that the statutory scheme for implementing a WTO ruling had not yet been completed, it nonetheless urged the panel to vacate the administrative review final results on the basis of the USTR's announcement. *Id.* at 64a-70a. The court of appeals denied the petition for rehearing on September 12, 2006, without comment. *Id.* at 1a.

6. Subsequent to the court of appeals' judgment, the Department of Commerce has issued three determinations that address the United States' implementation of the WTO appellate body report upon which petitioner relies. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (2006) (*Section 123 Notice*); *Implementation of the Findings of the WTO Panel in US–Zeroing*

(EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. 25,261 (2007) (*Section 129 Implementation*); *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 28,676 (2007) (*Fourth Administrative Review Final Results*). Each of those determinations specifies its temporal effect, and none applies the Department's new methodology retroactively to entries made at the time the antidumping order for petitioner's merchandise was in effect. See *Section 123 Notice*, 71 Fed. Reg. at 77,725 (new methodology applies to ongoing and future antidumping investigations); *Section 129 Implementation*, 72 Fed. Reg. at 25,262 (antidumping duty order revoked, but only "with respect to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after" April 23, 2007); *Fourth Administrative Review Final Results*, 72 Fed. Reg. at 28,677 (directing Customs to liquidate entries during the fourth administrative review period (*i.e.*, November 1, 2004, to October 31, 2005) at an antidumping duty rate of 2.52%, despite the fact that the *Section 129 Implementation* had revoked petitioner's antidumping order prospectively).

ARGUMENT

Petitioner does not contend that the Department of Commerce's final results were inconsistent with law or the Department's established policies at the time those results were adopted. Rather, petitioner urges (Pet. 13-19) that the court of appeals erred by refusing to vacate those concededly proper results and remand the case to

the Department to consider whether to apply retroactively an intervening change in the Department's methodology for calculating antidumping duties in initial investigations. No such remand is necessary, because the Department has made clear that it has not changed its methodology as it applies to administrative reviews such as the one at issue in this case.

Through a very detailed statutory process, the Department has announced specific actions that it will take to implement the WTO rulings on which petitioner relies. In particular, the Department has determined that it will (1) utilize a new methodology for calculating dumping margins in pending and future antidumping investigations, and (2) revoke the antidumping order applicable to petitioner, but only with respect to entries made after the USTR's directive to implement that determination. Neither action casts doubt on the final results of the administrative review at issue here. Indeed, in another administrative review concerning the same antidumping order, the Department has expressly stated that, in administrative reviews under that order, the Department will continue to calculate dumping margins using the same zeroing methodology as it utilized in the past. Thus, even assuming that it would ever be appropriate for this Court to vacate properly issued final results in order for the Department to consider implementing a WTO report, this case would not present a proper occasion for such extraordinary relief. Further review by this Court is therefore unwarranted.

1. Petitioner does not dispute that the antidumping order issued with respect to its products in 2001 was valid and consistent with the law and policies of the Department at the time of its adoption. That question was finally determined in favor of the Department by the

Federal Circuit in *Corus Staal, BV* v. *Department of Commerce*, 395 F.3d 1343 (2005), and this Court denied review of that determination, 126 S. Ct. 1023 (2006). The Federal Circuit specifically upheld the Department's methodology of "zeroing" nondumped sales as "permissible in the context of administrative investigations," 395 F.3d at 1347, and rejected petitioner's contention that Commerce's otherwise reasonable construction of the statutory text should nonetheless be set aside because it was inconsistent with the United States' international obligations as construed by the WTO, *id.* at 1348-1349. The court of appeals observed that Congress had specifically precluded courts from giving effect to WTO reports except insofar as the USTR had determined to implement them. *Id.* at 1349 (Congress authorized the USTR "to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation").

Nor does petitioner contest that the Department's zeroing methodology is permissible under the statute in the context of periodic administrative reviews of antidumping orders. That issue was also conclusively resolved in the Department's favor by the Federal Circuit in *Timken Co.* v. *United States*, 354 F.3d 1334, cert. denied, 543 U.S. 976 (2004). There, in the context of an administrative review, the court of appeals held that, although the statute did not compel zeroing, *id.* at 1341-1342, the Department's "zeroing practice is a reasonable interpretation of the statutory language," *id.* at 1342. The court noted that the Department's construction "makes practical sense," had been upheld repeatedly by the Court of International Trade (both before and after the URAA), and "combats the problem of masked dump-

ing, wherein certain profitable sales serve to 'mask' sales at less than fair value." *Id.* at 1342-1343.

2. Rather than challenging the validity of the final results at the time they were issued, petitioner urges the Court to vacate those results and remand the case to the Department in light of intervening determinations by the Department to change its methodology for calculating dumping margins in order to implement adverse WTO rulings. The premise of petitioner's argument is that "the computation method that supported issuance of the [initial antidumping] order [is] now abandoned" and the Department should be given an opportunity to address whether there is "any other basis on which the validity of the order can be maintained" or whether an administrative review can be based on an "order [that] was invalidly issued." Pet. 18.

That premise is incorrect. The Department has made very clear in its orders implementing the WTO reports that its change in methodology is only prospective in effect, and in no way calls into question the retroactive validity of the antidumping order that gave rise to the administrative review at issue in this case or the methodology applied in that administrative review. Thus, there is no basis for this Court to vacate the final results.

a. In support for its blanket assertion that the Department "announced its abandonment of zeroing," petitioner relies on the Department's notice that, pursuant to the statutory procedure in Section 123 of the URAA, 19 U.S.C. 3533, it would implement the WTO report. Pet. 9. Petitioner ignores, however, the salient fact that the Department specifically limited application of that change in policy to initial antidumping investigations still pending before the Department as of February 22,

2007. *Section 123 Notice*, 71 Fed. Reg. at 77,725 ("After careful consideration of the arguments presented by the commentors and the information needed to implement this change, and weighing the administrative burdens, the Department has determined to apply the final modification [in methodology] adopted through this proceeding to all *investigations pending before the Department as of the effective date.*") (emphasis added); 72 Fed. Reg. at 3783 (extending effective date to Feb. 22, 2007). Thus, the Section 123 determination does not in any way cast doubt on the validity of the antidumping order issued with respect to petitioner's products in 2001 (after *completion* of the relevant investigation) or on the first administrative review of that order, which the Department concluded in 2004.

b. Petitioner also relies on its prediction of how the government would implement the WTO report pursuant to Section 129 of the URAA, 19 U.S.C. 3538, with respect to petitioner's antidumping order in particular. Petitioner urges the Court to grant review on the basis of petitioner's assertion that the United States "committe[d] to the WTO to implement *in the instant antidumping proceeding* the abandonment of the zeroing methodology condemned" by the WTO. Pet. 18. See Pet. 18 n.13 ("Commerce recently has confirmed that *the change in policy will be applied to this proceeding.*") (emphasis added). There is no need, however, for the Court to rely on petitioner's prediction of how the Department would implement the WTO report or on petitioner's characterization of the government's international undertakings. The Department has already made clear that its prospective implementation of the WTO report does not render invalid the antidumping order at issue here or the methodology used to calculate peti-

tioner's dumping margin as part of the administrative review.

In its April 9, 2007, Issues and Decision Memorandum, which the *Section 129 Implementation* incorporates, 72 Fed. Reg. at 25,261, 25,262, the Department made clear that the determination to revoke an antidumping order pursuant to Section 129 does not mean that the order was "invalid under U.S. law." *Issues and Decision Memorandum for the Final Results of the Section 129 Determinations* 17 (*Section 129 Memorandum*) <http://ia.ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-memo-20070410.pdf>. To the contrary, the order, "valid under U.S. law, remains in place up until the date on which USTR directs the Department" to revoke it and "all entries made prior to [that] date remain subject to potential liability for antidumping duties." *Ibid.* Consistent with that understanding, the *Section 129 Implementation* states that, "[p]ursuant to section 129(c), the new determination shall apply with respect to unliquidated entries of the subject merchandise *that are entered, or withdrawn from warehouse, for consumption on or after*" April 23, 2007, the date on which the USTR directed the Department to implement the new determination. 72 Fed. Reg. at 25,262 (emphasis added); 19 U.S.C. 3538(c). See *Section 129 Memorandum* 17 ("pursuant to the statute and the SAA, any revocations resulting from these section 129 proceedings will not apply to entries made before the date of USTR's direction").

c. Finally, petitioner contends (Pet. 18-19) that, despite Congress's specification that Section 129(c) determinations have only prospective effect, 19 U.S.C. 3538(c), which the Department confirmed in its *Section 129 Implementation*, the Court should nonetheless va-

cate and remand because the Department may have discretion, independent of Section 129(c), to apply its new methodology for calculating dumping margins retroactively to the present administrative review. Even if such speculation might conceivably provide a sufficient basis to vacate a concededly valid administrative ruling in a context in which there was some indication that the agency on remand might apply its new rule retrospectively, here there is no such indication. To the contrary, the Department has expressly stated that its new methodology for calculating dumping margins in initial antidumping investigations does *not* apply retroactively to administrative reviews of antidumping orders that were validly adopted and in place at the time of the entries concerned.

As noted above, in its recent *Fourth Administrative Review Final Results*, the Department determined that entries of petitioner's subject merchandise that occurred during the fourth administrative review period (2004-2005) are subject to the antidumping duty rate of 2.52 percent determined in that review, despite the fact that the *Section 129 Implementation* revoked petitioner's antidumping order prospectively. 72 Fed. Reg at 28,677. The *Fourth Administrative Review Final Results* adopted the Department's response to petitioner's retroactivity argument in the *Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review* (May 15, 2007) (*Fourth Administrative Review Memorandum*) <http://ia.ita.doc.gov/frn/summary/netherlands/E7-9815-1.pdf>. There, the Department made clear that "no change has yet been made with respect to the issue of 'zeroing' in administra-

tive reviews," and that therefore "the Department will continue with its current approach to calculating and assessing antidumping duties in this administrative review." *Id.* at 14.

Addressing the specific question raised by petitioner here (Pet. 18-19, 22)—namely, whether the Department would revise its methodology in administrative reviews in light of the *Section 129 Implementation* that revoked the antidumping order prospectively with respect to petitioner's merchandise—the Department expressly stated that it "is not altering its administrative review determination as a result of the post-[period of review] prospective revocation of the order." *Fourth Administrative Review Memorandum* 14. The Department noted both the "clear statutory language regarding prospective implementation, and the SAA language noting that prior entries may be subject to potential duty liability." *Ibid.* The Department did not categorically preclude the possibility of exercising its discretion to modify a policy or practice in a future administrative review covering entries that pre-date the implementation of a Section 129 determination, even though a Section 129 determination applies only to future entries. In this case, however, the Department explained that "the Department considers that the Appellate Body report represents a substantial departure from the understanding of the Antidumping Agreement at the time it was concluded" and the Department therefore "decline[d] to consider giving any broader retrospective effect to the revocation of the order" in these proceedings. *Ibid.*

The Department has made clear that neither its change of methodology for future initial antidumping investigations nor its prospective revocation of the antidumping order in these proceedings in implementa-

tion of the WTO report undermines the validity of the antidumping order or the Department's methodology for calculating dumping margins with respect to the entries at issue in this case. Thus, there is no need for this Court to remand in order "to permit the agency to consider fully the implementation issues which arise from" the Section 123 or 129 implementation determinations. Pet. 18-19. The Department's determinations make clear that there has been no "change in policy" that implicates the principle cited by petitioner, that a court should remand following an agency's change in policy in order to permit the agency to determine in the first instance the extent to which the policy change should be applied retroactively. Pet. 16-17 (citing *NLRB* v. *Food Store Employees Union*, 417 U.S. 1 (1974); *Panhandle Eastern Pipeline Co.* v. *FERC*, 890 F.2d 435, 438-449 & n.10 (5th Cir. 1989); *Williston Basin Interstate Pipeline Co.* v. *FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999)).

3. Petitioner contends (Pet. 19) that the court of appeals' "failure to remand * * * directly implicates the United States' international obligations under the WTO Agreements." That argument has been rendered moot by the Department's determination to implement the WTO report without making retroactive changes to its methodology for calculating dumping margins in administrative reviews.

Petitioner properly recognizes "the importance of allowing the Executive Branch to take the primary role in implementing adverse WTO reports without interference from the Judiciary." Pet. 20-21. Such deference to the political branches is appropriate here not only in light of general separation-of-powers principles, but also under the comprehensive statutory scheme through which Congress ensured that only the Executive

Branch, in consultation with the Legislative Branch, would determine whether and to what extent the United States would implement adverse WTO determinations. See H.R. Doc. No. 316, *supra*, at 659 (specifying that WTO panels and Appellate Body reports "will not have any power to change U.S. law or order such a change" and that "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it"). See also 19 U.S.C. 3512(c)(1) (no person "may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with" the Uruguay Round Agreements); 19 U.S.C. 3533(g)(1) (any regulation or practice that a WTO body has found inconsistent with the Agreements "may not be amended, rescinded, or otherwise modified * * * unless and until" the elaborate procedures set forth in the subsection have been complied with); 19 U.S.C. 3538(b)(3), (d) (providing for consultation between the USTR, Congress, and other relevant stakeholders before the USTR makes a determination whether and how to implement a WTO body report). Here, the Executive Branch has made clear that it does not intend to alter the methodology by which the Department calculates dumping margins on merchandise that entered the country subject to a valid antidumping order many years ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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